

1-1-1992

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Recommended Citation

George Schuyler, *The Litigation of the America's Cup Runneth over with Inconsistencies: A New Approach to Interpreting Charitable Trusts*, 12 Loy. L.A. Ent. L. Rev. 221 (1992).

Available at: <http://digitalcommons.lmu.edu/elr/vol12/iss1/9>

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THE LITIGATION OF THE AMERICA'S CUP RUNNETH OVER WITH INCONSISTENCIES: A NEW APPROACH TO INTERPRETING CHARITABLE TRUSTS

[T]he basic convention for any game is the assumption of a level field, that all begin as equals, above board. Without that convention, there is no contest. The highly moralized . . . world of any sport is very fragile in the face of the amoral quest . . . to win at any cost, even at the cost of destroying the game.¹

I. INTRODUCTION

In the spring of 1990, the New York Court of Appeals² held in *Mercury Bay Boating Club Inc. v. San Diego Yacht Club*³ that the America's Cup trophy rightfully belonged to the San Diego Yacht Club ("SDYC" or "San Diego"). The America's Cup is a silver trophy for which yacht clubs from around the world compete to win in regularly held sailing matches. Traditionally, the yacht club that wins the America's Cup (the "Cup") defends it in the next competition and accepts challenges from other yacht clubs to race for the Cup.

In 1987, a controversy arose after New Zealand's Mercury Bay Boating Club ("MBBC," "Mercury Bay" or "New Zealand") issued an unorthodox challenge to the SDYC, the Cup's defender.⁴ The MBBC proposed to race in a ninety-foot monohull yacht, a size that had not been raced in the America's Cup competition for fifty years.⁵ The SDYC, on the other hand, planned to adhere to the current practices of using smaller boats and of conducting the competition after the usual three to four year interval between races. Accordingly, the SDYC refused the challenge.⁶ Mercury Bay sued to force San Diego to accept its challenge.⁷ After the trial court held in favor of the MBBC, the SDYC

1. *Mercury Bay Boating Club Inc. v. San Diego Yacht Club*, 557 N.E.2d 87, 100 (N.Y. 1990) [hereinafter "*Mercury Bay III*"] (quoting A. BARTLETT GIAMATTI, TAKE TIME FOR PARADISE: AMERICANS AND THEIR GAMES 62-63 (1989)).

2. The New York Court of Appeals is New York's highest court. THE BLUEBOOK A UNIFORM SYSTEM OF CITATION 195-96 (15th ed. 1991).

3. 557 N.E.2d 87 (N.Y. 1990).

4. *Id.* at 90.

5. *Id.*

6. *Id.*

7. *Id.* at 91. America's Cup controversies are decided in New York courts of law because a trust instrument created the America's Cup competition and accordingly, New York trust

decided to defend the Cup in a catamaran.⁸

The New York Court of Appeals held that questions of "fairness" and "sportsmanship" in the yachting context were unsuitable for judicial resolution.⁹ It also held that the use of extrinsic evidence was inappropriate in resolving the controversy at hand.¹⁰ Nevertheless, the court in effect resolved these questions by failing to condemn the SDYC's decision to race a relatively small and quick catamaran against a large and slow monohull.¹¹ Consequently, the court implicitly condoned San Diego's behavior as "fair" and "sportsmanlike." Further, the court considered extrinsic evidence in its decision, although stating that it would not.¹² The inconsistencies, therefore, lie in the court's use of the concepts of "fairness" and "sportsmanship" and extrinsic evidence in the decision while purporting to base its decision "only on the legal issues presented."¹³

This note examines the background of the America's Cup controversy and analyzes the New York Court of Appeals' decision in light of current trust principles. Further, this note suggests that the court should have explicitly considered all relevant extrinsic evidence, instead of selectively doing so in answering the implicitly resolved questions of "fairness" and "sportsmanship." In particular, this note recommends that courts, given the task of interpreting trusts, should follow current California contract law. In California, the parol evidence rule, normally a rule of exclusion, does not bar the admission of extrinsic evidence in interpreting contractual language.¹⁴

law governs disputes that arise out of the races. See Alex M. Johnson & Ross D. Taylor, *Revolutionizing Judicial Interpretation of Charitable Trusts: Applying Relational Contracts & Dynamic Interpretation to Cy Pres & America's Cup Litigation*, 74 IOWA L. REV. 545, 548 n.8 (1989).

8. See Johnson & Taylor, *supra* note 7, at 559. A catamaran is a twin-hulled boat. A hull is "the hollow, lowermost portion of a vessel, floating partially immersed in the water and supporting the remainder of the vessel." WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 691 (1989). A catamaran's two hulls provide the requisite stability without the massive weight that a monohull requires to ensure stability. The SDYC's *Stars and Stripes* weighed in at 6,000 pounds; the MBBC's *New Zealand* weighed in at 75,000 pounds. *Mercury Bay III*, 557 N.E.2d at 104 (Hancock, J., dissenting).

9. *Mercury Bay III*, 557 N.E.2d at 92.

10. *Id.* at 94-95.

11. A monohull is a boat that has only one hull. Since it has only one hull, a monohull requires a great deal of weight to maintain stability. See *supra* note 8.

12. The court stated that it would not employ extrinsic evidence to reach its decision, see *Mercury Bay III*, 557 N.E.2d at 92, yet did so on several occasions. See *infra* notes 93-101 and accompanying text.

13. *Mercury Bay III*, 557 N.E.2d at 93.

14. See *Pacific Gas & Electric Co. v. G.W. Thomas Drayage & Rigging Co.*, 442 P.2d 641 (Cal. 1968) (The California Supreme Court and Justice Traynor altered California contract

II. PRELIMINARY ANALYSIS: BACKGROUND OF THE CONTROVERSY

The history of the America's Cup, leading up to and including this litigation, began in the mid-nineteenth century. In 1857, the owners of the yacht *America* donated a silver cup trophy, won in a race around the Isle of Wight,¹⁵ to the New York Yacht Club ("NYYC") through a Deed of Gift.¹⁶ With this gift, they established a charitable trust.¹⁷ Over the years, the trust has been formally amended and interpreted by both the original donors and the New York courts to resolve various problems that have arisen in the administration of the trust.¹⁸

Under the Third Deed of Gift of 1887,¹⁹ any yacht club that successfully defeats the defending club becomes the new defender and trustee of the Cup.²⁰ If, however, the defender of the Cup prevails against its challengers, it remains the defender and trustee of the Cup.²¹ As defender and sole trustee, the victorious club must administer the trust.²² The Deed of Gift outlines the constraints on the participants and the competition itself.²³ For example, it specifies permissible lengths for competing vessels and the conditions under which challenges may issue.²⁴

law by rejecting the notion that the meaning of any writing appearing unambiguous on its face must be determined without resort to extrinsic evidence).

15. See Johnson & Taylor, *supra* note 7, at 547. The Isle of Wight is in the English Channel off the coast of Great Britain. WEBSTER'S ENCYCLOPEDIA UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE, Atlas of the World 4 (1989).

16. *Mercury Bay III*, 557 N.E.2d at 89.

17. See *infra* notes 189-90 and accompanying text.

18. The Cup was returned to George L. Schuyler, the sole surviving donor, after questions arose concerning the trust's terms. Schuyler resolved those questions by twice amending the Deed of Gift. See Johnson & Taylor, *supra* note 7, at 549-51. Additionally, the New York courts, at the request of the NYC, then-trustee of the Cup, twice modified the Deed of Gift in 1956 and 1985. *Id.* at 553-54. In 1956, the court modified the Deed to reduce the minimum load water-line length of a competing vessel from sixty-five feet to forty-four feet. *Id.* at 553. This modification was intended to increase interest in the competition by making it more affordable to build a boat, and it succeeded in doing so. *Id.* at 554. In 1985, the court modified the Deed to allow a race to be held in the southern hemisphere. *Id.* at 554 n.68.

19. The Third Deed of Gift of 1887 followed the First Deed of Gift of 1857 and the Second Deed of Gift of 1881. See Johnson & Taylor, *supra*, note 7, at 553-54. The original trust instrument was twice-amended to resolve problems that had arisen in the trust's administration. *Id.* All references to the "deed" are to the Third Deed of Gift, unless otherwise specified.

20. See *infra* Appendix C.

21. *Id.*

22. One of the duties of the trustee of the America's Cup is to manage the race, *i.e.*, make preparations for the next race. *Mercury Bay III*, 557 N.E.2d at 101.

23. See *infra* Appendix C.

24. The Third Deed states that a challenger is entitled to a match against any "yacht or vessel," "propelled by sails only," which, if single-masted, must measure between forty-four and ninety feet on the load water-line. See *infra* Appendix C. The challenger must provide at

In 1987, the SDYC, racing the *Stars and Stripes '87*, defeated the Australian defender, the *Kookaburra III*, to become only the third trustee of the Cup.²⁵ Shortly afterward, the MBBC challenged the new defender and current trustee, the SDYC, to a race. Under this challenge, this race was to be held within a few months²⁶ using a boat of a size that had not been raced in the America's Cup competition in fifty years.²⁷ San Diego ignored the challenge.²⁸

Mercury Bay filed suit in the supreme court²⁹ of New York, the laws of which control the trust instrument that created the America's Cup competition.³⁰ The MBBC requested that the court declare its challenge valid and enjoin the SDYC from considering other challenges until the SDYC responded to Mercury Bay's challenge.³¹

The SDYC initiated its own lawsuit asking the court to interpret or amend the third and final Deed of Gift to: 1) preclude challenges such as Mercury Bay's; or 2) require all future competitions, including the one at issue, to conform to the current practice of racing boats smaller than ninety feet—the size proposed by the MBBC—in a multinational challenger regatta series.³²

least ten months' notice to the defender club. *Id.* Races must be conducted between May 1 and November 1. *Id.* All other details are left for the competitors to resolve. *Id.*

25. Since its inception, the NYYC had been the sole defender and trustee of the America's Cup until 1983, when the Royal Perth Yacht Club of Australia defeated the NYYC. *See* Johnson & Taylor, *supra* note 7, at 554.

26. The San Diego Yacht Club had delayed announcing the date of the next race. Believing the SDYC to be unfairly stalling, Mercury Bay requested an immediate competition. *See* Johnson & Taylor, *supra* note 7, at 555.

27. For the last half century, the America's Cup competition was raced with the smaller forty-four-foot, or twelve-meter, monohulls. This smaller boat is cheaper to build than the larger monohulls that had been raced in previous America's Cup competitions and thus allowed more countries to participate in the race. *See* Johnson & Taylor, *supra* note 7, at 553.

28. In its challenge, the MBBC requested a deviation from the recent practice of holding the race every three to four years in smaller monohulls. Accordingly, the SDYC refused to answer the MBBC challenge. *See supra* note 7, at 556.

29. In New York, the court nomenclature is different than in most other states: the trial court is known as the supreme court; the appellate court is named the supreme court, appellate division; and the highest state court is called the court of appeals. *THE BLUEBOOK A UNIFORM SYSTEM OF CITATION* 195-96 (15th ed. 1991).

30. "Because the Deed of Gift established a charitable trust in New York, the New York courts have jurisdiction over all disputes involving the America's Cup. *See* N.Y. EST. POWERS & TRUSTS LAW § 8-1.1(c) (McKinney Supp. 1989)." *See* Johnson & Taylor, *supra* note 7, at 548 n.8.

31. The Deed of Gift provides that, when a challenge from a Club fulfilling all the conditions required by the deed is received, no other challenge may be considered until the pending event is decided. *See infra* Appendix C.

32. Mercury Bay Boating Club Inc. v. San Diego Yacht Club, 545 N.Y.S.2d 693, 696 (A.D. 1 Dept. 1989) [hereinafter "*Mercury Bay II*"]. This race format permitted "multiple

A. *The Supreme Court's Decision: Accept, Forfeit or Negotiate*

The court consolidated the two cases and ruled in favor of the MBBC, thereby validating its challenge and denying the SDYC's request for *cy pres* relief.³³ The doctrine of *cy pres* developed to allow alterations to "charitable trusts whose purpose had become obsolete as a result of changed conditions not taken into account by the original settlor or donor."³⁴ San Diego had argued that the relatively recent upsurge in popularity of the America's Cup competition and the corresponding increase in the number of participants had rendered the America's Cup trust extremely difficult to administer. Accordingly, the SDYC felt that the court should amend the Deed to facilitate the future administration of both the trust and the race.³⁵

In their trial briefs, the MBBC argued for literal compliance with the terms of the Third Deed of Gift, while the SDYC asked the court not to adhere to the literal conditions of the deed but to amend the deed as requested.³⁶ The supreme court agreed with Mercury Bay and held that the MBBC's challenge was valid under the terms of the trust.³⁷ Further, it held that San Diego's request for amendment of the deed was improper and unnecessary.³⁸ Therefore, the court held that Mercury Bay's challenge must be considered and that the SDYC had three options: it could accept the challenge, forfeit the Cup or negotiate terms with the MBBC.³⁹

After attempts to negotiate agreeable terms failed, the two parties prepared for the competition.⁴⁰ In January 1988, the SDYC announced that it planned to defend the Cup in a catamaran, a multihull. A multihulled vessel had never been raced in America's Cup history, although its dimensions coincided with those explicitly permitted under the Deed of Gift.⁴¹ The MBBC sought to have the San Diego club held in con-

challengers" [racing twelve-meter yachts] to hold a "sail-off . . . to determine who may sail for the Cup." See Johnson & Taylor, *supra* note 7, at 556 n.86.

33. *Mercury Bay II*, 545 N.Y.S.2d at 697.

34. See Johnson & Taylor, *supra* note 7, at 561.

35. *Mercury Bay II*, 545 N.Y.S.2d at 696.

36. See Johnson & Taylor, *supra* note 7, at 556 nn. 84-7 and accompanying text (citing *Mercury Bay Boating Club Inc. v. San Diego Yacht Club*, No. 21,299/87, at 2 [hereinafter "*Mercury Bay I*"]).

37. *Mercury Bay III*, 557 N.E.2d at 91.

38. The court felt that modifying the Deed according to the SDYC's requests would unfairly allow the Cup's defender to mandate the conditions for future competitions. See Johnson & Taylor *supra* note 7, at 558 n.100 (citing *Mercury Bay I*, No. 21,299/87, at 19).

39. *Mercury Bay I*, No. 21,299/87, at 19.

40. *Id.*

41. *Id.*

tempt of the supreme court's order, claiming that San Diego's intention to race a catamaran against their large monohull would deny it the "match" to which they were entitled under the terms of the Deed of Gift.⁴² The supreme court found that nothing in the deed explicitly forbids a catamaran from participating in the race, directed the parties to reserve their protests until after the races were run and consequently denied Mercury Bay's request.⁴³

In September 1988, the MBBC and the SDYC raced for the America's Cup trophy.⁴⁴ San Diego's catamaran successfully defended its title against Mercury Bay's monohull, winning two races to zero.⁴⁵ Because it felt that the competition was inherently unfair, the MBBC asked the court to set aside the results of the races and declare it the winner.⁴⁶ The SDYC cross-motined, this time asking the court to affirm its victory.⁴⁷ The supreme court again decided in favor of Mercury Bay, stating that San Diego's actions violated the spirit and intent of the Deed of Gift, which implicitly required the vessels to be somewhat evenly matched.⁴⁸ San Diego was ordered to transfer the Cup to Mercury Bay.⁴⁹ The SDYC appealed.⁵⁰

B. The Holding of the Supreme Court, Appellate Division: No Similarity Required

The issue on appeal was whether the terms of the Deed of Gift required the vessels of the defender and challenger to be somewhat evenly matched. The supreme court held that, because of the settlors'⁵¹ explicit use of the words "friendly competition,"⁵² the settlors had implicitly in-

42. The Third Deed of Gift states, "Any organized Yacht Club . . . shall always be entitled to the right of sailing a match for this Cup, with a yacht or vessel . . ." See *infra* Appendix C (emphasis added).

43. *Mercury Bay III*, 557 N.E.2d at 91.

44. Literal compliance with the Deed and Mercury Bay's challenge prevented all other yacht clubs from participating in the challenge. See Johnson & Taylor, *supra* note 7, at 559.

45. The margin of victory in the first race was over 18 minutes. See Johnson & Taylor, *supra* note 7, at 559 n.104. In fact, some suggest that Dennis Conner, the skipper of the SDYC's boat, reduced that time so that the race would not seem to be such a gross mismatch. *Mercury Bay III*, 557 N.E.2d at 97 n.3.

46. *Mercury Bay II*, 545 N.Y.S.2d at 697.

47. *Id.*

48. See Johnson & Taylor, *supra* note 7, at 559 n.111 (citing *Mercury Bay I*, No. 21,299/87 at 13).

49. *Mercury Bay II*, 545 N.Y.S.2d at 697.

50. *Id.*

51. The definition of settlor is: "The grantor or the donor in a deed of settlement. And also one who creates trusts." BLACK'S LAW DICTIONARY 1373 (6th ed. 1990).

52. "This Cup is donated upon the condition that it shall be preserved as a perpetual

tended that the boats be "somewhat evenly matched."⁵³ The appellate court, however, concluded that the boats were not required to be similar, thus disagreeing with the lower court's holding.⁵⁴

The appellate court found that, "[i]n interpreting a trust, courts must look to the intent of the settlor as expressed in the trust instrument. A court cannot look beyond the trust instrument where the donor's intent is expressed in clear and unambiguous terms."⁵⁵ Taking issue with the lower court's conclusion, the appellate court criticized the supreme court's creation of a condition that was neither express nor implied in the trust document.⁵⁶ Because a condition limiting the defender of the Cup to a particular vessel was not explicitly provided in the trust document, the appellate court concluded that it could not read such a condition into the trust.⁵⁷

The appellate court also disagreed with the supreme court's statement regarding the deed's requirement that the challenger give ten months' notice of the dimensions of its boat to the Cup's defender. The court found that this requirement did not suggest that the defender had to enter a boat that was similar to the challenger's entry.⁵⁸ The appellate court reasoned, "We cannot find such an intent, especially since the author of the deed could have stated the rule in a few words, had he so desired."⁵⁹ Finally, the appellate court noted that the supreme court initially did not mandate similarity between vessels, yet changed its tack, so to speak, after the races had ended and subsequently required similarity.⁶⁰

The appellate court then tried to show that a catamaran was a permissible vessel in which to defend the America's Cup by using extrinsic evidence to show that catamarans existed and raced head to head against monohulls without handicaps.⁶¹ The appellate court explained that the donors broadly defined the range of vessels that could race as "any one

Challenge Cup for *friendly competition* between foreign countries." See *infra* Appendix C (emphasis added).

53. *Mercury Bay II*, 545 N.Y.S.2d at 698.

54. *Id.* at 702.

55. *Id.* at 698 (citations omitted).

56. *Id.*

57. *Id.*

58. *Mercury Bay II*, 545 N.Y.S.2d at 698.

59. *Id.*

60. *Id.* at 699.

61. *Id.* A racing handicap is: "1. a race or other contest in which certain disadvantages or advantages of weight, distance, time, etc., are placed upon competitors to equalize their chances of winning." WEBSTER'S ENCYCLOPEDIA UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 642 (1989).

yacht or vessel."⁶²

Based on extrinsic evidence, the appellate court defined the word "match" to mean one party contending against another.⁶³ This interpretation contradicted the supreme court's position that the word "match" required the vessels to be similar.⁶⁴ According to the appellate court, George Schuyler, the sole surviving donor of the Cup, wrote in 1871, "[t]he word 'match' . . . mean[s] that but one vessel could start against a party challenging . . .,"⁶⁵ instead of racing a fleet of vessels against one boat.⁶⁶ Thus, according to the court, the settlors intended this phrase to restrict the competitors to one vessel, not to similar vessels.⁶⁷

To further demonstrate that the donors never intended the supreme court's interpretation, the appellate court pointed to Schuyler's rejection in 1887 of claims that requiring the challenger to give ten months' notice of the four principal dimensions of its boat was unfair.⁶⁸ Schuyler stated that the challenger was required to inform the defender in advance of these dimensions in order to give the defender an opportunity to meet the challenger in a yacht of the same type, if the defender so desired.⁶⁹ Hence, the appellate court concluded that "even if there were a general requirement of similarity fairly inferable from the deed, the statements of the donor himself negate any notion that the giving of the four dimensions would enable, much less require, the defender to produce a 'somewhat evenly matched' boat."⁷⁰

Finally, the appellate court noted that situations similar to the SDYC-MBBC dispute had arisen in 1907 and in 1913.⁷¹ In the earlier controversies, a challenger had attempted to force the defender to sail a vessel identical to its own.⁷² In response, the trust holders unanimously adopted a resolution stating that they could not accept any challenge that would attempt to restrict their choice of design beyond those set forth in the deed.⁷³ The trust holders explained their rejection of these challenges, reasoning that to accept them would deprive the defending club of its choice of the size and power of yacht it wished to race under the

62. *Mercury Bay II*, 545 N.Y.S.2d at 699.

63. *Id.* at 700.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Mercury Bay II*, 545 N.Y.S.2d at 700.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 700-01.

72. *Mercury Bay II*, 545 N.Y.S.2d at 701.

73. *Id.*

terms of the deed.⁷⁴

In the court's words, the history of the America's Cup is such that, [f]or 140 years, challengers and defenders alike have . . . expended immeasurable effort to gain any speed advantage . . . to enhance their chances for victory. . . . Moreover, to compel the trustee to accept constraints upon the competition that are not specified in the trust agreement, without the mutual consent of both challenger and defender, would itself contravene the competitive scheme contemplated by the Deed of Gift.⁷⁵

Based on this use of extrinsic evidence, the appellate court interpreted the deed to allow a catamaran defense of the America's Cup, and ruled in favor of San Diego.⁷⁶

III. ANALYSIS OF THE COURT OF APPEALS' DECISION

A. *The Majority Opinion: The Use of Extrinsic Evidence Is Forbidden*

The issue in the majority opinion of the court of appeals was "whether the donors of the America's Cup intended to exclude catamarans or otherwise restrict the defender's choice of vessel by the vessel selected by the challenger."⁷⁷ To determine the intent of the trust settlers who created the America's Cup competition, the court employed long-settled rules of construction of trusts.⁷⁸ These included: 1) the prohibition on looking first to extrinsic evidence;⁷⁹ 2) the interpretation of the trust instrument as written;⁸⁰ and 3) the determination of the settlor's intention solely from the unambiguous language of the instrument itself.⁸¹ Only where the court determines that the trust's words are ambiguous may it consult extrinsic evidence.⁸²

The court deemed the language of the trust unambiguous and plain,⁸³ and thus formally excluded the use of extrinsic evidence in construing the trust instrument.⁸⁴ It further found that nowhere in the Deed of Gift did the donors explicitly prohibit the use of multihulled vessels, such as catamarans, or seek to limit the defender of the Cup to the same

74. *Id.*

75. *Id.* at 703-04.

76. *Id.* at 704.

77. *Mercury Bay III*, 557 N.E.2d at 93.

78. *Id.*

79. *Id.* (citing *New York Life Ins. & Trust Co. v. Hoyt*, 55 N.E. 299 (1899)).

80. *Id.* (citing *Central Union Trust Co. v. Trimble*, 174 N.E. 72 (1930)).

81. *Mercury Bay III*, 557 N.E.2d at 93.

82. *Id.* (citing 2A SCOTT, TRUSTS § 164.1, at 253-54 (Fratcher 4th ed. 1987)).

83. *Mercury Bay III*, 557 N.E.2d at 93.

84. *Id.*

or similar type of vessel chosen by the challenger.⁸⁵ In a formalistic opinion written for the majority, Judge Alexander stated that the phrase "against any one yacht or vessel"⁸⁶ implied that the defender could race "in a single vessel of any type."⁸⁷

The only restriction on the defender, according to the court of appeals, was the water-line length restrictions applicable to all contestants for the Cup.⁸⁸ In response to the dissent's charge that the dimensions specified in the Deed of Gift related only to monohulls, the court asserted that the dimensions limited "only the challenging vessel."⁸⁹ Further, the court found that "the question of whether the dimensions themselves relate to multihull vessels is simply not relevant to the issue of whether the deed precludes a catamaran defense."⁹⁰ The court reasoned that the role of the specified dimensions was simply to limit the challenger.⁹¹ Otherwise, the defender would be greatly disadvantaged, due to the challenging vessel having more time to design and build its vessel, and the defender having only ten months.⁹²

The court referred to sources extrinsic to the Deed of Gift in its discussion of the applicability of the specified dimensions to multihull vessels.⁹³ The court stated: "We note that the applicability of the required dimensions to multihull vessels is hotly contested by the parties . . . both of whom have submitted expert evidence . . ."⁹⁴ Additionally, the court rejected Mercury Bay's contention that the phrase "friendly competition between foreign countries"⁹⁵ required the Cup's defender to race a boat that was at least substantially similar to the challenger's. Instead, the court asserted that this "general phrase does not delineate any of the specific requirements of the matches to be held."⁹⁶ To further refute Mercury Bay's suggestion, the majority pointed to the deed itself.⁹⁷ The language "permits a match between a 44-foot monohull and a 90-foot monohull—two vessels which . . . cannot be said to be 'evenly

85. *Id.*

86. *Id.*

87. *Id.*

88. *Mercury Bay III*, 557 N.E.2d at 93.

89. *Id.* at 94.

90. *Id.*

91. *Id.* at 93-94.

92. *Id.* The Third Deed of Gift states that "[t]he Challenging Club shall give ten months' notice, in writing" See *infra* Appendix C.

93. Early in its opinion, the court emphasized that it would not consult evidence extrinsic to the trust document in its interpretation. See *supra* note 84 and accompanying text.

94. *Mercury Bay III*, 557 N.E.2d at 94.

95. See *infra* Appendix C.

96. *Mercury Bay III*, 557 N.E.2d at 94.

97. *Id.*

matched' given the much greater speed potential of the larger boat."⁹⁸

In yet another instance of the court's use of extrinsic evidence to prove its point, and for the first time defining what it found to be "fair" or "sportsmanlike," the court referred to the MBBC's initial challenge to the SDYC.⁹⁹ The majority stated, "[i]t was Mercury Bay, not San Diego, that departed [from] the agreed-upon conditions of the previous 30 years. San Diego responded to Mercury Bay's competitive strategy by availing itself of the competitive opportunity afforded by the broad specifications in the deed."¹⁰⁰ This reference to a prior historical event clearly indicates a willingness on the part of the majority to refer to extrinsic evidence. Immediately after this reference to extrinsic evidence, however, the court boldly and inconsistently asserted, "[w]e may not look beyond the four corners of the deed in ascertaining the donors' intent and therefore may not consider any extrinsic evidence . . ."¹⁰¹ In effect, the court consulted extrinsic evidence when to do so supported its arguments, but refused to do so when such evidence suggested another resolution to the controversy.

After claiming to dispose of the MBBC's language-based arguments, the court focused on Mercury Bay's efforts at showing that San Diego had breached the charitable trust by the latter's decision to race a catamaran.¹⁰² The SDYC, as trustee and defender of the America's Cup, had a duty to the beneficiaries to administer the trust solely in the interest of the beneficiaries.¹⁰³ Specifically, "[the trustee] is not permitted to place himself in a position where it would be for his own benefit to violate his duty to the beneficiaries."¹⁰⁴ Mercury Bay believed that San Diego's duty as trustee was "to make a fairly considered and unbiased construction of the Deed of Gift in its selection of a defending yacht."¹⁰⁵ Accordingly, the MBBC contended that San Diego's decision to defend in a catamaran—a clearly faster boat than the large monohull the MBBC proposed—breached that duty.¹⁰⁶

According to the concurrence, however, the dissent attempted to "impose a duty on the defender to—well, to do just what? To not try too

98. *Id.*

99. *Id.* Recall that the court stated, earlier in the opinion, that the issues of "fairness" and "sportsmanship" would not be discussed. *Id.* at 92.

100. *Id.* at 94.

101. *Mercury Bay III*, 557 N.E.2d at 94-95.

102. *Id.* at 95.

103. RESTATEMENT (SECOND) OF TRUSTS § 170 (1959).

104. 2A SCOTT, TRUSTS § 170 (Fratcher 4th ed. 1987).

105. *Mercury Bay III*, 557 N.E.2d at 98 n.6 (Hancock, J., dissenting).

106. *Id.*

hard to win."¹⁰⁷ The majority found that the competition had started even before the race officially began.¹⁰⁸ The deed made it clear that the design and construction of the yachts, as well as the races themselves, were part of the competition.¹⁰⁹ Further, the defender of the Cup was not only a trustee but also a beneficiary and thus could be expected to try to win the race for the Cup. The court of appeals found that "the America's Cup trust promotes a sporting competition in which the donors clearly intended that the trustee compete on equal terms with the trust beneficiaries."¹¹⁰

In the majority's view, the trustee was required to "act in good faith and in the spirit of friendly competition by reasonably attempting to reach an accord on the terms of the matches,"¹¹¹ and "by racing a vessel which met the load water-line specifications in the Deed of Gift."¹¹² The court found that the SDYC met those fiduciary obligations.¹¹³ Finally, the majority characterized Mercury Bay's contention that San Diego was required to give them a fair competition as simply an argument "that San Diego's conduct was 'unsportsmanlike' and 'unfair.'"¹¹⁴ These issues, in the majority's view, were properly resolved by yachting experts, not the courts.¹¹⁵

B. The Dissenting Opinion: A Gross Mismatch Is No Match at All

In a lengthy dissenting opinion,¹¹⁶ Judge Hancock found that the dispute did not turn on whether the competition was fair: "[T]he overwhelming consensus of opinion was that it was 'one of the greatest mismatches in history.'"¹¹⁷ Instead, the issue was whether San Diego could interpret the deed to allow a catamaran defense of the Cup and "foreclose any possibility of a New Zealand victory, without violating the terms of its trust and thwarting the donors' very aim in establishing the trophy: namely, that 'it shall be preserved as a perpetual *Challenge Cup* for *friendly competition*.'"¹¹⁸

107. *Id.* at 96 (Wachtler, J., concurring).

108. *Id.* at 94.

109. *Id.*

110. *Mercury Bay III*, 557 N.E.2d at 95.

111. *Id.*

112. *Id.*

113. *Id.* at 96.

114. *Id.*

115. *Mercury Bay III*, 557 N.E.2d at 96.

116. *Id.* at 97 (Hancock, J., dissenting).

117. *Id.* at 97 n.3 (quoting Poe, *A-Cup XXVII*, SANTANA, Oct. 1988, App., vol. II, at CA 959, JA 2503).

118. *Id.* at 97 (quoting the Third Deed of Gift). See *infra* Appendix C.

The dissent first acknowledged the gravamen of the majority's opinion: the trust's settlors could not have intended to limit the participants to race in monohulls "because there is no express language stating [so]" ¹¹⁹ Before attacking the majority's main arguments, however, the dissent discussed several preliminary issues. First, the dissent pointed out that the appeal did not concern the propriety of Mercury Bay's initial challenge to San Diego, even though San Diego persistently tried "to cast doubt on the propriety of New Zealand's ¹²⁰ conduct." ¹²¹ The supreme court had held that the ninety-foot monohull the MBBC proposed to race "fully conformed with all the requirements of the Deed of Gift." ¹²²

Second, San Diego argued and the majority held that the entire controversy concerning the fairness of a race between a monohull and a multihull "should have been referred to an international jury of 'IYRU^[123]-certified racing Judges.'" ¹²⁴ The dissent, however, did not view the dispute as simply analogous to "'whether one vessel or another cut inside or outside a marker.'" ¹²⁵ Rather, it characterized the controversy as relevant to "'the fundamental nature of the America's Cup competition [which] call[ed] for a judicial construction of a trust instrument.'" ¹²⁶

Having refuted two of the majority's preliminary arguments, the dissent addressed the heart of the case—whether the SDYC had breached its fiduciary obligations to the trust's beneficiaries. Judge Hancock described the duties of a trustee: "[T]he defender must act in all respects with nothing less than irreproachable fairness." ¹²⁷ The dissent also declared that these duties are owed "to any yacht club which may file a challenge against it, . . . to past defenders and trustees of the America's Cup, those who have engaged in America's Cup competitions and to interested members of the international yacht racing community." ¹²⁸ The dissent discussed the standards governing the conduct of America's Cup defenders ¹²⁹ as "'not honesty alone, but the punctilio^[130] of an honor the

119. *Id.* at 98.

120. New Zealand is the MBBC's sponsor country. References to New Zealand in this note are equivalent to references to Mercury Bay.

121. *Mercury Bay III*, 557 N.E.2d at 99 n.7.

122. *Id.* at 99.

123. "IYRU" is an abbreviation for the International Yacht Racing Union. *Mercury Bay III*, 557 N.E.2d at 92. "[A]n international jury referees the match and decides all protests jointly submitted to it by the parties." *Id.*

124. *Mercury Bay III*, 557 N.E.2d at 99.

125. *Id.* at 100 (quoting *Amici Brief* at 25 n.11, *Mercury Bay III*, 557 N.E.2d 87 (1990)).

126. *Id.*

127. *Mercury Bay III*, 557 N.E.2d at 100.

128. *Id.*

129. Those standards apply to trustees generally. *Id.*

130. The definition of the word punctilio is "1. a fine point, particular, or detail, as of

most sensitive.' ”¹³¹

The dissent admitted the difficulty in defining “legal duties involving standards of ethics and integrity”¹³² and the “defender’s responsibilities as trustee in other than general terms.”¹³³ However, it noted several aspects of the defender’s role as trustee that indicated exactly what was expected of the defender. First, the trustee’s duty arose in the sporting context, not in the marketplace.¹³⁴ Therefore, the rules of the marketplace, such as “ ‘greed, commercialism and zealotry,’ ” did not apply.¹³⁵ Instead, “ ‘skill or merit . . . [should] win out.’ ”¹³⁶ Second, the defender was a competitor as well as a trustee.¹³⁷ Thus, the defender, as trustee of the America’s Cup, was in the peculiar “position to make a unilateral rule [of] interpretation affecting his opponents’ competitive positions . . . to virtually assure victory for himself.”¹³⁸ This conflicted with the defender’s role as a trustee. As trustee, the defending club must administer the trust, or manage the race, in the interest of the beneficiaries.¹³⁹

Finally, the dissent noted that the defender, as trustee of the America’s Cup, should be guided by the instructions in the Deed of Gift. These instructions read: “This Cup is donated upon the condition that it shall be preserved as a perpetual Challenge Cup for *friendly competition* between foreign countries”¹⁴⁰ and a challenger “shall always be entitled to the right of sailing a *match* for this Cup.”¹⁴¹ Armed with evidence that San Diego had deliberately tried avoiding any competition in order to circumvent the MBBC challenge, the dissent concluded that the

conduct, ceremony, or procedure. 2. strictness or exactness in the observance of formalities or amenities.” WEBSTER’S ENCYCLOPEDIA UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 1165 (1989).

131. *Mercury Bay III*, 557 N.E.2d at 100 (quoting *Meinhard v. Salmon*, 164 N.E. 545, 546 (1928)).

132. *Mercury Bay III*, 557 N.E.2d at 100.

133. *Id.*

134. *Id.*

135. *Id.* at 107 (quoting *Mercury Bay III*, 557 N.E.2d at 96, Wachtler, J., concurring).

136. *Mercury Bay III*, 557 N.E.2d at 108 (quoting A. BARTLETT GIAMATTI, TAKE TIME FOR PARADISE: AMERICANS AND THEIR GAMES 60 (1989)).

137. *Id.* at 100. “[T]he courts have fixed a very high and very strict standard . . . whenever his [the trustee’s] personal interest comes or may come into conflict with his duty to the beneficiaries.” *Id.* at 100-01 (quoting 2A SCOTT, TRUSTS § 170.25 at 436 (Fratcher 4th ed. 1989)). The majority, however, did not impose this high standard on the SDYC. Instead, it found that San Diego was within its bounds as a competitor to “[avail] itself of the competitive opportunity afforded by the broad specifications in the deed.” *Id.* at 101 n.10 (quoting *Mercury Bay III*, 557 N.E.2d at 94).

138. *Mercury Bay III*, 557 N.E.2d at 101.

139. *Id.*

140. *Id.* (quoting Third Deed of Gift). See *infra* Appendix C.

141. *Mercury Bay III*, 557 N.E.2d at 102 (quoting Third Deed of Gift) (emphasis added).

SDYC had violated the condition of "friendly competition" by defending in a catamaran.¹⁴²

Citing historical evidence, the dissent argued that the "match" guaranteed by the Deed of Gift failed to occur when San Diego raced a catamaran against Mercury Bay's ninety-foot monohull. The dissent noted that George L. Schuyler, the only surviving donor of the America's Cup, had stated in an 1871 letter regarding a dispute between the Royal Thames Yacht Club and the NYYC that "'a match' means one party contending with another party *upon equal terms as regards the task or feat to be accomplished*."¹⁴³ During another dispute, Schuyler "underscored the dominant theme of his 1871 letter: that the *governing principle of America's Cup competition is fairness*, that a race between a challenger and a defender for the 'Challenge Cup' *should be a fair match on equal terms*."¹⁴⁴

The dissent also addressed the majority's claim that the MBBC should have taken its dispute to the International Yacht Racing Union because issues of "fairness" and "sportsmanship" were not properly decided in the courts. In response, the dissent pointed to a provision from the Restatement (Second) of Trusts: "[I]f the trustee in exercising or failing to exercise a power does so . . . to further some interest of [its] own . . . , the court will interpose."¹⁴⁵ Therefore, the relevant question was whether the decision to defend in a catamaran was to further San Diego's own interest at the expense of the MBBC, a beneficiary.¹⁴⁶ If it was, San Diego had breached its fiduciary obligations to Mercury Bay.¹⁴⁷ The dissent opined, "San Diego, in making a rigid and overly literal construction of the Deed of Gift, did so for its own interest and contrary to the interests of the beneficiaries."¹⁴⁸

The dissent then refuted the majority's claims that multihulled ves-

142. *Id.* For an example of such evidence, see the comment of Dennis Conner, Skipper of *Stars and Stripes* that "[t]he catamaran is a tool to deal with the problem—an unwanted problem." *Mercury Bay III*, 557 N.E.2d at 97 n.4 (quoting USA TODAY, Sept. 9, 1988, CA 1037, JA 2826).

143. *Mercury Bay III*, 557 N.E.2d at 102 (quoting letter of April 15, 1871) (emphasis added).

144. *Mercury Bay III*, 557 N.E.2d at 103 (emphasis added).

145. *Id.* (quoting RESTATEMENT (SECOND) ON TRUSTS § 187 cmt. g (1959)).

146. *Id.* "[R]esolution of the decisive issue—whether the Deed of Gift has been properly construed—depends . . . on whether San Diego, as trustee, ought to have read it" in a manner permitting a catamaran defense. *Id.* at 103-04.

147. For evidence of San Diego's intent, see the comment of Malin Burnham that "[W]e want to be sure we can put his challenge away with little trouble. We don't want to do anything to risk San Diego losing the 1991 series." *Id.* at 97 n.5 (quoting SPORTS ILLUSTRATED, Dec. 7, 1987, App., vol. I, at CA 331, JA 1012).

148. *Mercury Bay III*, 557 N.E.2d at 107.

sels were not excluded by the Deed of Gift.¹⁴⁹ The majority claimed: 1) the challenger, not the defender of the Cup, is limited by the dimension restrictions in the Deed of Gift;¹⁵⁰ 2) the required ten-month notice only "removes the competitive advantage which would otherwise inure to the challenger;"¹⁵¹ and 3) the phrase "any yacht or vessel"¹⁵² stands for the proposition that the defending yacht club is not limited by the type or kind of boat it raced.¹⁵³

According to the dissent, however, the length restrictions had no relevance to multihulled vessels.¹⁵⁴ Moreover, the ten-month notice served as a guideline for the defender so that it "can construct a defending yacht of comparable size and capability."¹⁵⁵ The notice provision has been used for the past one hundred forty years where the competing vessels have been of virtually equal length.¹⁵⁶

To refute the majority's third contention, the dissent employed a linguistic analysis of the word "any."¹⁵⁷ According to the dissent, the word "any" has a primary and a secondary definition.¹⁵⁸ San Diego relied on the secondary definition in concluding that the phrase "any yacht or vessel" signified that there "should be no limit on the types or kinds of yachts or vessels chosen to meet a challenger."¹⁵⁹ In the dissent's view, a more appropriate interpretation of the word "any" suggested that the donors intended the phrase to limit the defender to only one yacht, as opposed to defending in more than one.¹⁶⁰ Accordingly, the majority's broad interpretation is inaccurate.

The dissent noted that the catamaran traditionally was not considered appropriate for racing in the America's Cup races.¹⁶¹ Through the

149. *Id.* at 104.

150. *Id.* at 93-4.

151. *Id.* at 93.

152. *See infra* Appendix C.

153. *Mercury Bay III*, 557 N.E.2d at 105.

154. *Id.* at 104.

155. *Id.* "The importance of having closely matched load water-line lengths in racing monohulls is that the length . . . bears a direct relationship to its hull speed." *Id.* at 102-03 n.11.

156. *Id.* at 102-03 n.11.

157. *Mercury Bay III*, 557 N.E.2d at 105.

158. *Id.* The primary definition of "any" is: "1. one (no matter which) of more than two; as, any boy may go." *Id.* at n.16 (quoting WEBSTER'S NEW 20TH CENTURY DICTIONARY, SECOND EDITION). The secondary definition of "any" is: "2. some (no matter how much, how many, or what kind); as, do you have any apples?" *Id.* at n.17 (quoting WEBSTER'S NEW 20TH CENTURY DICTIONARY, SECOND EDITION).

159. *Mercury Bay III*, 557 N.E.2d at 105.

160. *Id.*

161. *Id.* at 106.

broad use of extrinsic evidence, the dissent concluded that San Diego ignored the legal duty that trust law imposed on it by "adopting a constricted reading of the 'any one yacht or vessel' clause to justify its choice of a catamaran and assure New Zealand's defeat."¹⁶²

IV. THE INHERENT AMBIGUITY OF LANGUAGE REQUIRES REFERENCE TO EXTRINSIC EVIDENCE IN THE INTERPRETATION OF TRUSTS

A. *Introduction: Reference to Extrinsic Evidence Is Always Necessary*

The discussion above demonstrates that a resolution of the most recent America's Cup controversy entailed examination of extrinsic evidence and concepts such as "fairness" and "sportsmanship." The question of whether San Diego could construe the Deed of Gift to permit a catamaran defense of the Cup arose in both the majority and dissenting opinions. The majority answered that question in the affirmative; the dissent, in the negative. Both, nevertheless, referred to sources extrinsic to the trust instrument.¹⁶³ The difference in the opinions lies in the majority's implicit use of extrinsic evidence coupled with its refusal to so acknowledge, and the dissent's explicit and frequent use of this kind of evidence.

Instead of claiming not to refer to extrinsic evidence, as the majority did,¹⁶⁴ courts should acknowledge that interpretation of trusts, especially those created long before the time of interpretation, requires extensive reference to extrinsic evidence. Once courts admit this necessity, the fact finder can spend the resources to sift through the sometimes conflicting sources of evidence, and arrive at an equitable and just resolution of the controversy at hand. In *Mercury Bay Boating Club Inc. v. San Diego Yacht Club*, if the court had formally admitted extrinsic evidence rather than implicitly and selectively doing so, it would have arrived at the dissent's conclusion that a catamaran defense was neither contemplated nor intended by the original donors of the Cup.¹⁶⁵

B. *The "Plain Meaning" Rule: Language Is Inherently Ambiguous*

In effect, the majority in *Mercury Bay Boating Club Inc. v. San Diego Yacht Club* relied upon the plain meaning rule of interpretation to

162. *Id.* at 108.

163. The dissent knowingly and explicitly referred to extrinsic evidence. The majority, however, implicitly but possibly unknowingly consulted this kind of evidence.

164. See *supra* notes 9-10 and accompanying text.

165. *Mercury Bay III*, 557 N.E.2d at 104.

exclude the use of extrinsic evidence in its determination of the donors' intent.¹⁶⁶ This method of interpretation determines the meaning of a writing that is clear and unambiguous on its face from the four corners of the instrument without resorting to extrinsic evidence.¹⁶⁷ The rule against disturbing a "clear" meaning has drawn many supporters, including Justice Oliver Wendell Holmes. Holmes justified the rule based on a concern for practicality, stating that not adhering to the plain meaning rule "would open too great risks if evidence were admissible to show that when they said 'five hundred feet' they agreed that it should mean one hundred inches, or that 'Bunker Hill Monument' should signify the 'Old South Church.'"¹⁶⁸

In various forms, this rule has been used to interpret written instruments such as contracts, statutes and trusts.¹⁶⁹ In the area of contract law, the parol evidence rule, which embodies the plain meaning rule, prevents courts from considering extrinsic evidence in interpreting contracts.¹⁷⁰ In 1968, however, the California Supreme Court in *Pacific Gas & Electric Co. v. G.W. Thomas Drayage & Rigging Co., Inc.*¹⁷¹ ("*Pacific Gas*") "turned its back on the notion that a contract can ever have a plain meaning discernible by a court without resort to extrinsic evidence."¹⁷² In other words, it held that reference to extrinsic evidence is necessary in interpreting a contract.

C. *Pacific Gas & Electric Co. v. G.W. Thomas Drayage & Rigging Co., Inc.: A Revolutionary Case*

A review of the *Pacific Gas* decision shows why courts should permit extrinsic evidence to show parties' intentions in written instruments, particularly trusts. The *Pacific Gas* case involved a contract dispute between a plaintiff who suffered damage to his property and a defendant, who was allegedly bound to "indemnify" the plaintiff "against all loss

166. *Id.* at 93.

167. J. CALAMARI & J. PERILLO, CONTRACTS §§ 3-9 at 117 (1977). In *Mercury Bay III*, the majority stated that "the trust instrument is to be construed as written and the settlor's intention determined solely from the unambiguous language of the instrument itself." *Mercury Bay III*, 557 N.E.2d at 93 (citing 2A SCOTT, TRUSTS § 164.1 at 253-54 (Fratcher 4th ed. 1987)).

168. 9 WIGMORE, ON EVIDENCE § 2462 at 199 (1981).

169. E. FARNSWORTH, CONTRACTS § 7.12 at 501 (1982).

170. *Id.*

171. *Pacific Gas & Electric Co. v. G.W. Thomas Drayage & Rigging Co., Inc.*, 442 P.2d 641 (Cal. 1968).

172. *Trident Center v. Connecticut General Life Ins. Co.*, 847 F.2d 564, 568 (9th Cir. 1988).

[and all] damage”¹⁷³ The trial court rebuffed the defendant’s offer of extrinsic evidence to show that the parties’ intentions did not contemplate indemnifying the plaintiff for the damages. The court held that the “plain language” of the contract precluded the defendant’s attempt to avert indemnification.¹⁷⁴ On appeal, however, the California Supreme Court, in an historical opinion written by Justice Traynor, allowed the defendant the opportunity to present extrinsic evidence so that the court could determine the parties’ intentions.¹⁷⁵

Under traditional contract principles, extrinsic evidence is inadmissible to interpret, change or add to the terms of an unambiguous integrated written instrument.¹⁷⁶ Justice Traynor, however, believed that “contractual obligations flow not from the words of the contract, but from the intention of the parties.”¹⁷⁷ The parties’ intentions are divined from what the parties meant by the words they used in the document.¹⁷⁸ Accordingly, “the exclusion of relevant, extrinsic evidence to explain the meaning of a written instrument could be justified only if it were feasible to determine the meaning the parties gave to the words from the instrument alone.”¹⁷⁹

The California Supreme Court concluded that it was impossible to determine the meaning that the parties gave to the words from the instrument alone. Justice Traynor reasoned that, “[i]f words had absolute and constant referents,¹⁸⁰ it might be possible to discover contractual intention in the words themselves, and in the manner in which they were arranged.”¹⁸¹ However, because words do not have absolute referents but are simply symbols of thought that have no fixed significance,¹⁸² the

173. *Pacific Gas*, 442 P.2d at 643.

174. *Id.*

175. *Id.* at 645-46.

176. *Trident Center*, 847 F.2d at 568 (citing 4 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS, § 631, at 948-49). Corbin stated that, when a court decides that “the written words are so plain and clear and unambiguous that they need no interpretation and that evidence is not admissible, it is making an interpretation on the sole basis of the extrinsic evidence of its own linguistic experience and education.” Jeffrey Devashrayee, Note, *Trident Center v. Connecticut General Life Ins. Co.: The Continuing Demise of the California Parol Evidence Rule*, 4 UTAH L. REV. 991, 1001 n.65 (1989) (quoting CORBIN, *The Interpretation of Words and the Parol Evidence Rule*, 50 CORNELL L.Q. 161, 189 (1965)).

177. *Trident Center*, 847 F.2d at 568.

178. *Pacific Gas*, 442 P.2d at 644.

179. *Id.* Note the opinion’s reference to a “written instrument,” not simply to a contract.

180. The definition of referent is: “1. The object or event to which a term or symbol refers.” WEBSTER’S ENCYCLOPEDIA UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 1206 (1989).

181. *Pacific Gas*, 442 P.2d at 644.

182. *Id.* (quoting *Pearson v. State Social Welfare Bd.*, 353 P.2d 33, 39 (Cal. 1960)).

"meaning of particular words or groups of words varies with the verbal context and surrounding circumstances . . . and experience of their users."¹⁸³ The meaning of a writing

can only be found by interpretation in the light of all the circumstances that reveal the sense in which the writer used the words. The exclusion of parol evidence regarding such circumstances merely because the words do not appear ambiguous to the reader can easily lead to the attribution to a written instrument of a meaning that was never intended.¹⁸⁴

Thus, Justice Traynor demonstrates his reluctance to apply the plain meaning rule to written instruments in general.

According to Justice Traynor, if a court decides, after considering the proffered extrinsic evidence, that the language of a contract "is fairly susceptible of either one of the two interpretations contended for . . .,"¹⁸⁵ extrinsic evidence relevant to either meaning is admissible.¹⁸⁶ In effect, the *Pacific Gas* court held that a party may introduce extrinsic evidence irrespective of how unambiguous the contract appears on its face.¹⁸⁷ The court reasoned that initially prohibiting extrinsic evidence merely because the contract writing appears unambiguous frustrates the court's primary purpose of discovering the parties' intentions in forming the contract.¹⁸⁸ California's admission of extrinsic evidence to interpret contracts in which two parties deal at arm's length and negotiate a contract demonstrates the need to allow this kind of evidence in interpreting charitable trusts. Extrinsic evidence is particularly useful where parties embody their desires in a written instrument and hold a right of property¹⁸⁹ in charitable trust¹⁹⁰ for the benefit of others.

183. *Pacific Gas*, 442 P.2d at 644 (quoting CORBIN, *The Interpretation of Words and the Parol Evidence Rule*, 50 CORNELL L.Q. 161, 187 (1965)).

184. *Id.* at 645 (quoting *Universal Sales Corp. v. California Press Mfg. Co.*, 128 P.2d 665, 679 (Cal. 1942)).

185. *Pacific Gas*, 442 P.2d at 645-46 (quoting *Balfour v. Fresno C.&I. Co.*, 41 P. 876, 877 (Cal. 1895)).

186. *Pacific Gas*, 442 P.2d at 646.

187. See Devashrayee, *supra* note 176, at 998.

188. *Id.* at 1001.

189. The definition of a trust is: "a fiduciary relationship in which one person is the holder of the title to property subject to an equitable obligation to keep or use the property for the benefit of another." BLACK'S LAW DICTIONARY 1508 (6th ed. 1990).

190. The definition of a charitable trust is: one "designed for the benefit of a class or the public generally. . . . In general, such must be created for charitable, educational, religious or scientific purposes." BLACK'S LAW DICTIONARY 1510 (6th ed. 1990).

D. Application of Pacific Gas Principles to Mercury Bay: The Trust Instrument Is Inherently Ambiguous

Courts have rejected literal adherence to the "plain meaning" rule in cases other than *Pacific Gas* and in areas of law other than contracts. For example, in the interpretation of congressional enactments, "judges have come to rely, increasingly, upon such extrinsic aids as committee reports and records of legislative history."¹⁹¹ Therefore, applying the concept of allowing extrinsic evidence to interpret written instruments such as contracts and statutes to the area of charitable trusts is not so foreign. Indeed, doing so will allow courts to more accurately assess a settlor's desires in the creation of a trust. Thus, courts will more likely arrive at a solution in accordance with those intentions.

The America's Cup donors created the competition through a charitable trust.¹⁹² They donated the trophy through a deed—a written trust instrument that embodied the uses and purposes of the gift.¹⁹³ Under the traditional trust principles discussed by the majority in *Mercury Bay*, a written trust's "uses and purposes"¹⁹⁴—i.e., the settlor's intentions—are determined from the "unambiguous language"¹⁹⁵ of the trust. Finding that the Deed of Gift was unambiguous, the *Mercury Bay* majority allegedly excluded the formal admission of extrinsic evidence.¹⁹⁶

As Justice Traynor wrote, however:

The test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible.¹⁹⁷

The *Mercury Bay* dissent offered evidence relevant to ambiguous portions of the Deed of Gift that were susceptible to different meanings.¹⁹⁸ The *Mercury Bay* majority should have used this approach and admitted the

191. Harry W. Jones, *The Plain Meaning Rule and Extrinsic Aids in the Interpretation of Federal Statutes*, 25 WASH. UNIV. L.Q. 2, 4 (1939).

192. *Mercury Bay III*, 557 N.E.2d at 95 n.4.

193. See *infra* Appendix C.

194. See *infra* Appendix C.

195. *Mercury Bay III*, 557 N.E.2d at 93.

196. *Id.*

197. *Pacific Gas*, 442 P.2d at 644 (quoting *Continental Baking Co. v. Katz*, 439 P.2d 889, 895 (Cal. 1968)).

198. See *supra* notes 142-60 and accompanying text. The California Supreme Court has stated further that "the conception of a writing as wholly and intrinsically self-determinative of the parties' intent to make it a sole memorial of one or seven or twenty-seven subjects of negotiation is an impossible one." *Masterson v. Sine*, 436 P.2d 561, 564-65 (Cal. 1968) (quoting 9 WIGMORE, EVIDENCE § 2431 at 103 (1981)).

extrinsic evidence considered by the dissent to help discern the settlors' intentions in establishing the America's Cup trust. Generally, these intentions were to preserve the Cup "as a perpetual Challenge Cup for friendly competition between foreign countries."¹⁹⁹

The dissent reviewed relevant extrinsic evidence to conclude that the America's Cup donors did not intend for a catamaran to defend the Cup. The dissent arrived at this conclusion after recognizing that the donors' aim in establishing the Cup was to maintain the Cup in perpetuity for friendly competition between challengers.²⁰⁰ Based on this general goal expressed by the settlors of the trust, the dissent consulted the past practices and history surrounding the America's Cup to discover how this general aim had materialized. In particular, the dissent determined that the requirements for specification and notification of length had "no importance" to catamarans.²⁰¹ Thus, the dissent found that "catamarans were never considered in connection with America's Cup races."²⁰²

Through these types of references to outside sources, the dissent determined that the SDYC breached its duty as trustee when it defended the Cup in a catamaran.²⁰³ At the very least, the question of a catamaran defense was not "cut and dried," as asserted by the majority.²⁰⁴

V. CONCLUSION

Justice Traynor and the California Supreme Court may not have realized the possible ramifications of the *Pacific Gas* decision regarding the judicial interpretation of written instruments. In *Pacific Gas*, the court interpreted a contract—a written document created by two relatively sophisticated parties dealing at arm's length who had contracted just eight years prior to the court's resolution of the dispute.²⁰⁵ In *Trident Center v. Connecticut General Life Ins. Co.*,²⁰⁶ the court dealt with two sophisticated parties who were dealing at arm's length a relatively short time before the dispute arose.²⁰⁷

The America's Cup controversy, however, stemmed from a written document created over a century prior to this dispute. Further, it involved a charitable trust, not a contract. Charitable trusts involve a rela-

199. See *infra* Appendix C.

200. See *infra* Appendix C.

201. *Mercury Bay III*, 557 N.E.2d at 104.

202. *Id.* at 106.

203. *Id.* at 107.

204. *Id.*

205. *Pacific Gas*, 442 P.2d at 643.

206. *Trident Center v. Connecticut General Life Ins. Co.*, 847 F.2d 564 (9th Cir. 1988).

207. *Id.* at 565.

tionship where one party creates a benefit for a class or the general public.²⁰⁸ Frequently, the settlor of a trust does not provide for many of the details that a contracting party might include.²⁰⁹ Thus, a court's ability to discern a trust drafter's true intentions is even more difficult than in the context of the contract. In the contractual context, California courts frequently refer to outside evidence.

Therefore, judicial acknowledgment of the impossibility of finding an inherent meaning in words,²¹⁰ whether in contracts, statutes or trust instruments, would enable courts to more accurately determine a writer's intentions in drafting a particular legal document. If courts continue to exclude extrinsic evidence in contexts such as the America's Cup, the ones "who . . . believe that [the] America's Cup has become a business, even one debased by 'greed, commercialism and zealotry,'" may be correct.²¹¹

Perhaps, the reality is that it has come to that. Still, there are those who believe that [the] America's Cup remains and should remain a sporting event in the accepted tradition where 'identical conditions and norms [are imposed] upon play, [and] the essential assumption of all the rules is that skill or merit . . . will win out.'²¹²

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208. BLACK'S LAW DICTIONARY 1510 (6th ed. 1990).

209. This is made evident not only by the fact that the original Deed of Gift was formally amended twice by the donors and changed several times by the New York courts, but also by the existence of this controversy in the first place. See *supra* note 18.

210. *Pacific Gas*, 442 P.2d at 644.

211. *Mercury Bay III*, 557 N.E.2d at 107.

212. *Id.* at 107-08 (quoting A. BARTLETT GIAMATTI, *supra* note 1 at 60).

* The author would like to thank the following: first, my family—my father Adib, my mother Camelia, my older brother Amgad and my younger sister Magda, to all of whom I dedicate this note; second, all of the editors and staff of the Loyola of Los Angeles Entertainment Law Journal, whose assistance in publication was tremendous; and last, professors Bryan Hull, John Nockleby and Peter Tiersma, whose thoughts and direction led to the ideas behind this note.

APPENDIX A²¹³

DEED OF GIFT OF 1857 (FIRST DEED OF GIFT)

TO THE SECRETARY OF THE NEW YORK YACHT CLUB: —

Sir: The undersigned, members of the New York Yacht Club, and late owners of the schooner yacht *America*, beg leave through you to present to the Club the Cup won by the *America*, at the Regatta of the Royal Yacht Squadron at Cowes, England, August 22, 1851.

This cup was offered as a prize to be sailed for by Yachts of all nations without regard to difference to tonnage, going round the Isle of Wight, the usual course for the Annual Regatta of the Royal Yacht Squadron, and was won by the *America*, beating eight cutters and seven schooner Yachts which started in the race.

The Cup is offered to the New York Yacht Club, subject to the following conditions:

Any organized Yacht Club of any foreign country shall always be entitled, through any one or more of its members, to claim the right of sailing a match for this Cup with any yacht or other vessel of not less than 30 or more than 300 tons, measured by the Custom House rule of the country to which the vessel belongs.

The parties desiring to sail for the Cup may make any match with the Yacht Club in possession of the same that may be determined upon by mutual consent; but in case of disagreement as to terms, the match shall be sailed over the usual course for the Annual Regatta of the Yacht Club in possession of the Cup, and subject to the Rules and Sailing Regulations the challenging party being bound to give six months' notice in writing, fixing the day on which they wish to start. This notice to embrace the length, Custom House measurement, rig, and name of the vessel.

It is to be distinctly understood that the Cup is to be the property of the Club, and not of the members thereof, or owners of the vessels winning it in a match; and that the condition of keeping it open to be sailed for by Yacht Clubs of all foreign countries, upon the terms above laid

213. See Johnson & Murphy, *supra* note 7, at 587.

down, shall forever attach to it, thus making it a perpetual Challenge Cup for friendly competition between foreign countries.

J.C. Stevens
Edwin A. Stevens
Hamilton Wilkes
J. Beekman Finley
George Schuyler

APPENDIX B²¹⁴

DEED OF GIFT OF 1881 (SECOND DEED OF GIFT)

The America's Cup is again offered to the New York Yacht Club, subject to the following conditions:

Any organized Yacht Club of a foreign country, incorporated, patented or licensed by the Legislature, admiralty or other executive department, having for its annual regatta an ocean water course on the sea or on an arm of the sea (or one which combines both), practicable for vessels of 300 tons, shall always be entitled, through one or more of its members, to the right of sailing a match for this Cup, with a yacht or other vessel propelled by sails only, and constructed in the country to which the Challenging Club belongs, against any one yacht or vessel as aforesaid, constructed in the country of the club holding the Cup.

The yacht or vessel to be of not less than 30 nor more than 300 tons, measured by the Custom House rule in use by the country of the challenging party.

The challenging party shall give six months' notice in writing, naming the day for the proposed race, which day shall not be less than seven months from the date of the notice.

The parties intending to sail for the Cup may, by mutual consent, make any arrangement satisfactory to both as to the date, course, time allowance, number of trials, rules and sailing regulations, and any and all other conditions of the match, in which case also the six months' notice may be waived.

In case the parties cannot mutually agree upon the terms of a match, then the challenging party shall have the right to contest for the Cup in one trial, sailed over the usual course of the Annual Regatta of the club holding the Cup, subject to its rules and sailing regulations, the challenged party not being required to name its representative until the time agreed upon for the start.

Accompanying the six months' notice, there must be a Custom-house certificate of the measurement, and a statement of the dimensions, rig and name of the vessel.

No vessel which has been defeated in a match for this Cup can be again selected by any club for its representative until after a contest for it by some other vessel has intervened, or until after the expiration of two years from the time such contest has taken place.

214. *Id.* at 588 (quoting R. COFFIN, *THE AMERICA'S CUP* at 132-34).

Vessels intending to compete for this Cup must proceed under sail on their own bottoms to the port where the contest is to take place.

Should the club holding the Cup be for any cause dissolved, the Cup shall be handed over to any club of the same nationality it may select which comes under the foregoing rules.

It is to be distinctly understood that the Cup is to be the property of the club and not of the owners of the vessel winning it in a match, and that the condition of keeping it open to be sailed for by organized Yacht Clubs of all foreign countries, upon the terms above laid down, shall forever attach to it, thus making it perpetually a Challenge Cup for friendly competition between foreign countries.

George Schuyler

APPENDIX C²¹⁵

DEED OF GIFT OF 1887 (THIRD DEED OF GIFT)

This Deed of Gift, made the twenty-fourth day of October, one thousand eight hundred and eighty-seven, between George L. Schuyler as sole surviving owner of the Cup won by the yacht *America* at Cowes, england [sic], on the twenty-second day of August, one thousand eight hundred and fifty-one, of the first part, and the New York Yacht Club, of the second part, as amended by orders of the Supreme Court of the State of New York dated December 17, 1956, and April 5, 1985. WITNESS—ETH—

That the said party of the first part, for and in consideration of the premises and of the performance of the conditions and agreements hereinafter set forth by the party of the second part, has granted, bargained, sold, assigned, transferred, and set over, and by these presents does grant, bargain, sell, assign, transfer, and set over, unto said party of the second part, its successors and assigns, the Cup won by the schooner yacht *America*, at Cowes, England, upon the twenty-second day of August, 1851. To have and to hold the same to the said party of the second part, its successors and assigns, IN TRUST, NEVERTHELESS, for the following uses and purposes:

This Cup is donated upon the condition that it shall be preserved as a perpetual Challenge Cup for friendly competition between foreign countries.

Any organized Yacht Club of a foreign country, incorporated, patented, or licensed by the legislature, admiralty, or other executive department, having for its annual regatta an ocean water course on the sea, or on an arm of the sea, or one which combines both, shall always be entitled to the right of sailing a match for this Cup, with a yacht or vessel propelled by sails only and constructed in the country to which the Challenging Club belongs, against any one yacht or vessel constructed in the country of the Club holding the Cup.

The competing yachts or vessels, if of one mast, shall be not less than forty-four feet nor more than ninety feet on the load water-line; if of more than one mast they shall be not less than eighty feet nor more than one hundred and fifteen feet on the load water-line.

The Challenging Club shall give ten months' notice, in writing, naming the days for the proposed races; but no race shall be sailed in the

215. *Id.* at 589 (quoting Memorandum of Law of the San Diego Yacht Club, Exhibit A, Mercury Bay Boating Club Inc. v. San Diego Yacht Club, No. 21,299/87 (N.Y. Sup. Ct. Nov. 25, 1987)).

days intervening between November 1st and May 1st if the races are to be conducted in the Northern Hemisphere; and no race shall be sailed in the days intervening between May 1st and November 1st if the races are to be conducted in the Southern Hemisphere. Accompanying the ten months' notice of challenge there must be sent the name of the owner and a certificate of the name, rig, and following dimensions of the challenging vessel, namely, length on load water-line, beam at load water-line and extreme beam and draught of water which dimensions shall not be exceeded and a custom house registry of the vessels shall always be allowed to compete in any race for this Cup, and no restriction nor limitation whatever shall be placed upon the use of such centre-board or sliding keel be considered a part of the vessel for any purposes of measurement.

The Club challenging for the Cup and the Club holding the same may, by mutual consent, make any arrangement satisfactory to both as to the dates, courses, number of trials, rules and sailing regulations, and any and all other conditions of the match in which case also the ten months' notice may be waived.

In case the parties cannot mutually agree upon the terms of a match, then three races shall be sailed, and the winner of two of such races shall be entitled to the Cup. All such races shall be on ocean courses, free from headlands, as follows: The first race, twenty nautical miles to windward and return; the second race an equilateral triangular race of thirty-nine nautical miles, the first side of which shall be a beat to windward; the third race (if necessary) twenty nautical miles to windward and return, and one week day shall intervene between the conclusion of one race and the starting of the next race. These ocean courses shall be practicable in all parts for vessels of twenty-two feet draught of water, and shall be selected by the Club holding the Cup and these races shall be sailed subject to its rules and sailing regulations so far as the same do not conflict with the provisions of this deed of gift, but without any time allowances whatever. The challenged Club shall not be required to name its representative vessel until at a time agreed upon for the start, but the vessel when named must compete in all the races, and each of such races must be completed within seven hours.

Should the Club holding the Cup be for any cause dissolved, the Cup shall be transferred to some Club of the same nationality, eligible to challenge under this deed of gift, in trust and subject to its provisions. In the event of the failure of such transfer within three months after such dissolution, said Cup shall revert to the preceding Club holding the same, and under the terms of this deed of gift. It is distinctly understood that

the Cup is to be the property of the Club subject to the provisions of this deed and not the property of the owner or owners of any vessel winning a match.

No vessel which has been defeated in a match for this Cup can be again selected by any Club as its representative until after a contest for it by some other vessel has intervened, or until after the expiration of two years from the time of such defeat. And when a challenge from a Club fulfilling all the conditions required by this instrument has been received, no other challenge can be considered until the pending event has been decided.

AND the said party of the second part hereby accepts the said Cup subject to the said trust, terms, and conditions, and hereby covenants and agrees to and with said party of the first part that it will faithfully and fully see that the foregoing conditions are fully observed and complied with by any contestant for the said Cup during the holding thereof by it and that it will assign, transfer, and deliver the said Cup to the foreign Yacht Club whose representative yacht shall have won the same in accordance with the foregoing terms and conditions, provided the said foreign Club shall, by instrument in writing lawfully executed, enter with said party of the second part into the like covenants as are herein entered into by it such instrument to contain a like provision for the successive assignees to enter into the same covenants with their respective assignors, and to be executed in duplicate, one to be retained by each Club, and a copy thereof to be forwarded to the said party of the second part.

IN WITNESS WHEREOF, the said party of the first part has hereunto set his hand and seal and the said party of the second part has caused its corporate seal to be affixed to these presents and the same to be signed by its Commodore and attested by its Secretary, the day and year first above written.

George Schuyler
New York Yacht Club
by Elbridge T. Gerry
John H. Bird